

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

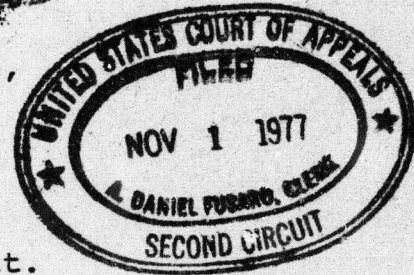
Original + Affidavit of Mailing
77-1302

To be argued by
Paul F. Corcoran

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 77-1302

*B
P/S*

UNITED STATES OF AMERICA,
Appellee,
-against-
KIVA MILLER,
Appellant.



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

Paul F. Corcoran,
Assistant United States Attorney,
(Of Counsel).

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

UNITED STATES OF AMERICA

Appellee,

- against -

KIVA MILLER,

Appellant.

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BRIEF FOR THE APPELLEE

PRELIMINARY STATEMENT

Kiva Miller appeals from an order of the United States District Court for the Eastern District of New York (Platt, D.J.), entered after a hearing and upon appellant's guilty plea, revoking appellant's probation and remanding him to the custody of the Attorney General for a period of eighteen months on a previously suspended sentence of four years and nine months.

On appeal, appellant contends: (1) that the District Court abused its discretion in imposing its original 1975 sentence; and (2) that the District Court abused its discretion in revoking probation and sentencing appellant to eighteen months imprisonment for what is termed a "minor violation".

Appellant is presently incarcerated pursuant to said sentence. ^{1/}

1/ On July 21, 1977, appellant moved in this Court for a stay of surrender or bail pending appeal from the District Courts' revocation order. After oral argument, appellant's application was denied.

STATEMENT OF THE CASE

Underlying Offense:

On November 7, 1975, appellant was convicted, upon his guilty plea, of conspiracy to manufacture methaqualone, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and Section 846. The felony charge to which he plead arose out of an investigation by agents of the Drug Enforcement Administration which revealed that during an eighteen month period in 1973 and 1974, appellant and his codefendant Harvey Segal were engaged in the illicit manufacture and distribution of methaqualone. Appellant's role in the conspiracy included procurement of the chemical precursors necessary for the production of the drug, as well as the distribution of the finished product to "street dealers" (A. 5).^{2/} The laboratory in which appellant and codefendant Segal were producing the drug was

^{2/} Unless otherwise specified, parenthetical page references preceeded by the letter "A" are to Appellant's Appendix; those preceeded by the letters "Tr." are to the transcript of the revocation hearing dated July 1, 1977, which has been submitted in its entirety as the Appellee's Appendix.

discovered during the execution of a search warrant on November 5, 1974. It was found to have a production capability of over 100,000 dosage units of methaqualone per month. Approximately 4.5 pounds of finished methaqualone was seized in the laboratory, together with larger quantities of chemicals used in the manufacture of the substance.

At sentencing, appellant, by his counsel, William Sonenshine, Esq. acknowledged his guilty participation in the "drug business" (A. 9). However, based upon his unblemished background and the financial burdens which incarceration would work upon his family and trucking business, appellant sought leniency (Id.).

In imposing sentence on November 7, 1975, Judge Platt noted his sympathy for appellant's plight. However, the Court concluded that the nature of the appellant's offense and society's need for "some even-handedness in the imposition of sentence" necessitated "some punishment" in appellant's case. In determining the appropriate punishment for the appellant, the Court specifically "individualized" appellant's sentence by taking into consideration the appellant's "good

record" and "particular circumstances", stating:

"Were it not for your good record,
and were it not for your particular
circumstances, you can rest assured
the sentence would have been more
serve than it is going to be. But
there must be some sentence imposed
for a drug offense of this nature"
(A. 11).

Based upon those expressed considerations, Judge Platt sentenced the appellant to five years imprisonment, suspending all but three months thereof, and placed appellant on probation for four years. "Condition (1)" of the probation imposed on November 7, 1975 reads as follows: "You shall refrain from any violation of any law (federal, state and local)...." Appellant acknowledged that condition with his signature on the day of sentence. (A. 5).

Probation Revocation

On May 2, 1977, appellant's probation officer filed a Violation of Probation Report with the Court informing Judge Platt that appellant had violated "Condition (1)" of his probation. Specifically, the report charged that on January 23, 1977 appellant was arrested by New York City Police while stealing cartons of merchandise from a fire-damaged Manhattan

warehouse. Upon his arrest, appellant was charged with Grand Larceny, Burglary and Criminal Possession of Stolen Property. The report noted that, due to the refusal of the victim to press charges, appellant was allowed to plead guilty in the state court to a reduced charge of Disorderly Conduct. Upon receipt of the report, Judge Platt scheduled a revocation hearing.

At the revocation hearing held July 1, 1977, the following undisputed testimony was developed. On the evening of Sunday, January 23, 1977, Nassau County Police Officer, Gilbert Sullivan, while off-duty and engaged in photographing a fire scene on West 30th Street in Manhattan, observed appellant and two other individuals removing cartons from inside a nearby warehouse^{3/} and placing them in a van on the street

^{3/} Appellant's brief suggests there was some dispute at the hearing as to whether the cartons were being removed from inside or outside the warehouse (App. Br. at p. 4). Based upon the alleged dispute, appellant states as established fact that he had seen the cartons "outside" the warehouse, and thinking them refuse, had taken them (App. Br. at pp. 4, 12). Appellant's statements are without foundation. Officer Sullivan, the only witness as to the events at the warehouse, testified that appellant was inside the warehouse and was removing cartons therefrom (Tr. 12, 23, 24). Appellant did not testify at the hearing; nor did anyone else dispute Sullivan's testimony.

(Tr. 12, 23-24). The van left the premises and returned on two occasions. Thereafter, Officer Sullivan noticed that the appellant and his colleagues were acting suspiciously. They were carrying flashlights and were "peering" out of the building before removing the cartons (Tr. 12-13). Suspecting that a crime was being committed, Sullivan approached the van. After he identified himself as a police officer, the appellant sped off in the van.

Thereafter, Officer Sullivan, together with several New York City Policemen, including Officer Harry Grant, who testified at the hearing, canvassed the neighborhood in search of the van. They located it a few blocks away, abandoned but loaded with cartons from the warehouse (Tr. 17, 40). A few minutes later appellant was seen exiting a building and running down the street (Tr. 19, 41-42). After being stopped, appellant took the police to a nearby building where additional stolen cartons were located (Tr. 20, 42). A total of twenty-six cartons of stolen toys were recovered from appellant's possession (Tr. 43). Appellant then asked the arresting officer if he could just "return the goods" (Tr. 20, 44). He was then arrested.

Finally, David Finkelstein, owner of the warehouse from which appellant stole the cartons of toys, testified that his building at 662 West 30th was adjacent to a fire scene and had suffered some damage during the January 7, 1977 fire. He testified that the building was secured and contained undamaged goods in his possession. Because of looting, the building was patrolled by police twenty-four hours a day. Finkelstein testified that he had not given the appellant permission to enter the premises or to remove any goods therefrom (Tr. 30).

Upon completion of the government's evidence, appellant rested without testifying or offering any evidence in contravention of the government's proof. He immediately thereafter entered a plea of guilty to the charge that he violated "Condition (1)" of his probation.

ARGUMENTPOINT IAPPELLANT'S ATTACK UPON HIS
1975 SENTENCE IS FRIVOLOUS

Appellant initially seeks vacation of his 1975 sentence on the ground that the District Court, in imposing sentence, failed to "individualize" his sentence. Citing, out of context, Judge Platt's pre-sentence statement that it was the Court's policy in drug cases to impose "some punishment", the appellant argues that the split sentence he received from Judge Platt under 18 U.S.C., §3651 was the result of an impermissibly "fixed and mechanical approach" to sentencing. Accordingly, appellant concludes, this Court should invalidate that harsh sentence and remand the case to a different judge for sentencing. Appellant's argument is frivolous.^{4/}

^{4/} Procedurally, appellant's attack upon his 1975 sentence is not properly before this Court. Sentence was imposed on November 7, 1975. Appellant took no direct appeal from the sentence. Nor did he even challenge the sentence by way of collateral attack. Not having been raised before the District Court, the issue is therefore not properly raised on appeal from an order revoking his probation.

That the District Court "individualized" appellant's 1975 sentence by giving full consideration to appellant's character and the circumstances surrounding his offense is evident in both the 1975 sentencing minutes and in the severity of the sentence actually imposed. At the time of sentencing Judge Platt specifically stated that he had considered everything appellant and his counsel had stated, as well as all the facts set forth in the Probation Report. It was based upon the appellant's individual character, and the circumstances surrounding the offense, that the original three-month jail term was imposed. A less harsh penalty for appellant's offense would have been wholly inappropriate. Indeed, the Court expressly noted that absent appellant's "good record" and "particular circumstances", a far more severe sentence would have been imposed (A. 11).^{5/}

On the instant record, a claim that the appellant's sentence was "fixed or mechanical" is meritless.

^{5/} Similarly, at the time of the probation revocation, Judge Platt stated that the original sentence had been imposed because, in the Court's judgment, the appellant "didn't belong in this Courtroom". He noted that the Court believed the appellant had "more intelligence" than to get involved in such a criminal venture (Tr. 58).

POINT II

THE DISTRICT COURT PROPERLY EXERCISED
ITS DISCRETION IN REVOKING APPELLANT'S
PROBATION

Appellant next argues that the District Court abused its discretion in revoking his probation and imposing an eighteen month prison term for what appellant terms a "minor offense". In the face of the uncontroverted evidence, and appellant's post-hearing plea of guilty to a violation of Condition (1) of his probation, appellant's contention is patently without merit.

Revocation of probation is proper whenever the sentencing court is reasonably "satisfied that appellant [has] abused the opportunity granted to him not to be incarcerated. United States v. Markovich, 348 F.2d 238, 241 (2d Cir. 1965)." United States v. Nagelberg, 413 F.2d 708 (2d Cir. 1969), cert. denied, 396 U.S. 1010 (1970). See also United States v. Manuszak, 532 F.2d 311, 317 (3rd Cir. 1976); Roberson v. State of Connecticut, 501 F.2d 305, 308 (2d Cir. 1974). While felonious conduct is universally held to violate a condition which inheres in every probation, see Roberson, supra, 501 F.2d at 308, even conduct which falls short of criminal conduct

may justify revocation of probation if it violates an express condition of the probationary period. See Manuszak, supra, 532 F.2d at 317; United States v. Chambers, 429 F.2d 410, 411 (3rd Cir. 1970).

Here, the District Court revoked appellant's probation on evidence that his conduct while on probation was felonious and in violation of "Condition (1)" of the terms of his probation. The Court heard the uncontroverted testimony that appellant entered David Finkelstein's warehouse at 662 30th Street without permission and took therefrom some 26 cartons of toys with the obvious intent to convert them to his own use. In light of such evidence, and the appellant's plea of guilty at the close of the hearing, it cannot be said that the District Court abused its discretion in revoking appellant's probation.

Nor has appellant offered any support for his allegation that the imposition of an eighteen month prison term constituted an abuse of discretion. Appellant was originally sentenced to five years, to serve three months. The balance of the prison term was suspended. Upon revocation of probation the Court could well have sentenced appellant to serve the remaining four years and nine months. The imposition of an eighteen month prison term was, under the circumstances, an exercise in leniency.

CONCLUSION

The order appealed from should be affirmed.

Dated: Brooklyn, New York
October 28, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL F. CORCORAN,
Assistant United States Attorney,
(Of Counsel).



AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK

} ss

Barbara Allen

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 31st day of October 1977 he served a copy of the within

Brief For The Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Mark Lemle Amsterdam, Esq.

299 Broadway

New York, N.Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Barbara Allen

Sworn to before me this

31

day of Oct

1977

Martha Schan

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